5.1 Retaliation

[Updated: 6/14/02]

Introductory Note

Note that in a mixed motive retaliation case in the First Circuit, Price-Waterhouse controls without any alteration by the 1991 amendments to Title VII and there is, therefore, no relief for a plaintiff if a defendant proves it would have taken the same action regardless. Tanca v. Nordberg, 98 F.3d 680, 684 (1st Cir. 1996) (Title VII retaliation) (Torruella, C.J.).

Pattern Jury Instruction

[Plaintiff] accuses [defendant] of violating federal law by retaliating against [her/him] for engaging in protected activities, namely, for [specify protected activity].[80] In order to prove illegal retaliation, [plaintiff] must persuade you, by a preponderance of the evidence, that

{Choose one of the following two bracketed phrases, depending on whether the case is a pretext or a mixed motive case (Note: a similar choice/modification must be made at the end of the instruction depending on whether the case is a pretext or a mixed motive case.):

> [81]{were it not for [her/his] protected activity, [defendant] would not have taken adverse employment action against [her/him].}
>
> [82]{[her/his] protected activity was a motivating factor in [defendant]'s decision to take adverse employment action against [her/him].}}

[Plaintiff] is not required to prove that [her/his] [protected activity] claim had merit in order to prove the retaliation claim.[83]

[Specify protected activity, *e.g.*, filing a discrimination complaint] is a "protected activity."

[84]{An "adverse employment action" is one that, standing alone, actually causes damage, tangible or intangible, to an employee. The fact that an employee is unhappy with something his or her employer did or failed to do is not enough to make that act or omission an adverse employment action.[85] An employer takes adverse action against an employee only if it: (1) takes something of consequence away from the employee, for example by discharging or demoting the employee, reducing his or her salary, or taking away significant responsibilities; or (2) fails to give the employee something that is a customary benefit of the employment relationship, for example, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.[86]}

{For a pretext case, insert the last 3 paragraphs of Instruction 1.1. For a mixed motive case, insert the last 5 paragraphs of Instruction 1.2.}

[80] This instruction is designed for retaliation cases. The Introductory Notes at the beginning of these instructions outline the statutory basis for a retaliation claim.

[81] This bracketed language should be used in a pretext case. See Instruction 1.1.

[82] This bracketed language should be used in a mixed motive case. See Instruction 1.2.

[83] Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261-62 (1st Cir. 1999) (Title VII and ADA) (Selya, J.); Mesnick v. General Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991) (ADEA retaliation) (Selya, J.). If necessary, it would be appropriate to add language explaining that the plaintiff need only establish that he or she had a reasonable belief that the claim had merit when the complaint that prompted the retaliation was filed. See Higgins, 194 F.3d at 261-62 (citing Mesnick, 950 F.2d at 827; Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 33 (1st Cir. 1990) (Title VII) (Torruella, J.)); see also Monteiro v. Poole Silver Co., 615 F.2d 4, 8 (1st Cir. 1980) (Title VII) (Campbell, J.) (holding that retaliation claim was properly rejected where plaintiff "had not shown that his accusations of discrimination were voiced in good-faith 'opposition' to perceived employer misconduct" as opposed to being "a smokescreen in challenge to the supervisor's legitimate criticism").

[84] This bracketed paragraph may be used in cases where there is a dispute about whether the action that the defendant allegedly took against the plaintiff constituted an adverse employment action. Although this question, if it arises, is one for the jury, see Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (Boudin, C.J.) (jury could find that plaintiff who was given a raise but assigned less challenging, largely menial responsibilities suffered an adverse employment action), in most cases the dispute will be about whether the defendant's challenged conduct was motivated by discriminatory animus, not whether it amounted to an adverse employment action. If there is no dispute about whether the alleged conduct, if proven, would constitute an adverse employment action, the bracketed paragraph may be deleted and the generic references to "adverse employment action" may be replaced by a brief description of the adverse employment action defendant allegedly took.

[85] Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA) (Selya, J.) ("[T]he inquiry must be cast in objective terms. Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.").

Blackie uses the term "materially adverse employment action," but does not define the term (or, more precisely, the significance of the word "materially") beyond what is included in the text of this instruction. Two other cases also use the modifier "materially" when discussing adverse employment actions (both cases take the language from Blackie), but neither of these cases indicates that a materially adverse employment action is different from an adverse employment action. Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 49-50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (Cyr, J.) (applying Title VII definition of adverse employment action); Larou v. Ridlon, 98 F.3d 659, 663 n.6 (1st Cir. 1996) (First Amendment political discrimination) (Cyr, J.) (applying, with reservation, Blackie definition of adverse employment action). Furthermore, none of these three cases uses the term "materially adverse employment action" exclusively; all three cases describe employment actions as "materially adverse" and "adverse" interchangeably. Other employment discrimination cases decided after Blackie have referred to adverse employment action without the modifier "materially." See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 33 (1st Cir. 2001) (Title VII and section 1981) (Cyr, J.); Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 53-54 (1st Cir. 2000) (ADEA) (Selya, J.); White v. New Hampshire Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII) (Bownes, J.).

[86] Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA) (Selya, J.). As the Blackie court noted, this definition is generalized because "[d]etermining whether an action is materially adverse necessarily requires a case-by-case inquiry." Id. Consequently, although there is little explicit guidance in the case law about what constitutes an adverse employment action, there are a number of cases that, by their factual holdings, help define the term. For example, in the majority of cases, the court does not explicitly analyze whether the challenged conduct constitutes an adverse employment action, presumably because certain actions, such as layoffs, salary reductions, and demotions, are generally recognized as adverse employment actions. See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23 (1st Cir. 2001) (Title VII and section 1981) (Cyr, J.) (termination); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15 (1st Cir. 1999) (Title VII) (Torruella, C.J.) (demotion); Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999) (salary reduction); see also Welsh v. Derwinski, 14 F.3d 85, 86 (1st Cir. 1994) (ADEA) (Per Curiam) ("Most cases involving a retaliation claim are based on an employment action which has an adverse impact on the employee, i.e., discharge, demotion, or failure to promote."). More helpful, though, are the cases where the court decided whether a jury could reasonably find that the challenged actions constitute adverse employment actions. In some cases, the court has defined what actions are insufficient to constitute an adverse employment action by upholding a trial court's conclusion that the defendant's conduct was not, as a matter of law, actionable. See, e.g., Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998) (Title VII) (Schwarzer,

Sr. Dist. J., N.D. Cal.) (plaintiff was subjected to increased email messages, disadvantageous assignments and "admonition that [he] complete his work within an eight hour [day]"); Blackie, 75 F.3d at 726 (plaintiffs claimed defendants refused to negotiate a "side agreement" to supplement their employment contract); Connell v. Bank of Boston, 924 F.2d 1169, 1179 (1st Cir. 1991) (ADEA) (Campbell, J.) (plaintiff who had already been fired and whose severance package was already calculated was forced to leave office two weeks early). In another useful class of cases, the court held that the challenged employment action could constitute an adverse employment action by either upholding a jury verdict for the plaintiff, see, e.g., White v. New Hampshire Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII) (Bownes, J.) ("ample evidence" of adverse employment action where plaintiff was harassed, transferred without her consent, not reassigned to another position, "and ultimately constructively discharged"), or holding that the defendant was not entitled to summary judgment on this issue. See, e.g., Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (Boudin, C.J.) (plaintiff given standard salary increase but assigned less challenging, largely menial responsibilities); DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997) (Title VII) (Bownes, J.) (plaintiff given five month assignment to job for which he had no experience and deprived of meaningful duties); Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (Title VII) (Boudin, J.) (defendant refused to grant plaintiff a hardship transfer); see also Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 48, 50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (Cyr, J.) (plaintiff given negative performance evaluations and deprived of responsibility for major account) (applying Title VII definition of adverse employment action).